Procedure outline, Spring 2004. Proefessor Lewis.

I. The *Erie* Doctrine: how does the Constitution ensure that a federal court sitting in diversity respects the states' spheres of power?

A. 1791: Rules of Decision Act: "The law of the several states, except where the Constitution or Acts of Congress otherwise require or provide, shall be regarded as rules of decisions in civil actions in the the courts of the United states, in cases where they apply" (28 U.S.C. § 1652). The RoDA is the basis for the *Swift* decision.

B. 1841: *Swift v. Tyson*: federal courts can look to the "general law"--a number of sources, including restatements, treatises, and caselaw from many jurisdictions--to find the law they want to apply (or, more cynically, federal judges can basically pick the law they liked the most). Itc. was a controversy about "bills of exchange": is NY state court precedent binding on a federal diversity court? No, says SCOTUS, because the NY precedents aren't "laws."

C. 1938: *Erie*: overruling the "course pursued" in *Swift* as unconstitutional: (1) when congress said "laws" in RoDA, it intended to cover the states' common laws; (2) *Swift* had not benefited the judiciary as expected; and (3) there is no federal common law anyhow--and it's an invasion of the states' rights to follow *Swift*, especially in light of Amendment X.

1. Constitutional aspects: *Erie* is a kind-of constitutional case in two ways: (1) Equal Protection, from Amendments XIV and V and the historical reasons for diversity jurisdiction; and (2) Federalism--since there is no part of the constitution that seems to give Congress the power to make state law, how can the federal courts make it? Plus, Amendment X.

D. 1945: *Guaranty Trust v. York*: the outcome determinative test: does the law in question significantly affect outcome? If so, it's substantive; if not, it's procedural. Procedural law, furthermore, is the "manner and means" by which a substantive right to recover is enforced--procedural rights are of a "mere remedial nature." But, as later cases demonstrate, the outcome determinative test applies too broadly, though, because nearly every rule affects the outcome in some way.

E. 1958: *Byrd*: the currently definitive approach to the *Erie* doctrine: (1) federal courts sitting in diversity must honor state-created rights and obligations, period; (2) federal courts sitting in diversity even must apply state-created "form and mode" rules if the outcome would be significantly different depending on the rule choice--unless federal interests outweigh the interest in protecting the rule's impact on the outcome.

F. 1965: *Hanna v. Plumer*: the beginning of the de-constitutionalization of the *Erie* problem--itc. looks to the Rules Enabling Act, rather than the constitution, for answers. The *Hanna* rule: if an FRCP is involved, apply it unless (1) there's no way you could rationally argue it's procedural, or (2) the FRCP advisory committee, SCOTUS, and congress all erred in placing the rule under the REA.

G. Modern cases

1. *Burlington Northern* (1987): state statute provided for a mandatory bonus to the respondent to a frivolous appeal. Instead of looking to the constitution or to *Erie*, SCOTUS looked to *Hanna* and said that FRAP 38 (permitting, but not mandating, single or double costs and fees to such respondents) conflicted with--and so prevailed over--the state statute.

2. *Stewart v. Ricoh* (1988): state caselaw refused to enforce forum selection clauses. SCOTUS held that 28 USC § 1404(a) governs federal court forum selection--although, in deciding how to apply § 1404(a), the lower court could, on remand, could consider the state's antipathy to forum selection clauses.

3. *Gasperini* (1996): state law permits judicial review of jury awards when they "deviate materially from what would be reasonable compensation"; federal law, from Amendment VII, however, only permits award review when the award "shocks the conscience." SCOTUS says the Reexamination clause permits direct application of the state review law, but then suggested a way to tiptoe, constitutionally, around the problem: the district court could apply the state law, initially, and then the appellate court could review the district court, under the federal law, for abuse of discretion.

4. *Semtek* (2001): the problem initially looks like a *Hanna* question--does FRCP 41 (b) prevail over state law? But the court, instead, says that FRCP 41(b) isn't actually on point; therefore, federal common law governs and so (1) the Supremacy Clause comes into play to limit the application of federal common law, and (2) federal common law, anyhow and because of the Supremacy Clause, says to apply state law unless there is a substantial federal interest at stake. Here, there is no such substantial federal interest, SCOTUS says, and so the state law should be used.

II. Litigation

A. Filing and preparing

1. Pleading

a) Historical background

(1) English common law: pleading at old English common law was full of technicalities; e.g., to get heard at the King's Bench, there had to be a breach of the peace, so parties would plead "*vi et armis*"; or, because a "writ of debt" allowed debtors to "wage law" with "oath helpers," creditors started using a "writ of trespass, indebitatus assumpsit."

(2) The Field Code: the Field Code emerged in the 1800s in New York and did two major things: (1) it merged law and equity, thus creating one form of action--the civil action; (2) it did away with writs--instead, a complaint only had to set forth the "facts constituting the cause of action." Code pleading is rooted, historically, in the Field Code.

(3) Law and equity: the differences: equity cases were heard with no jury; involved longer, factual pleadings; allowed depositions and subpoenas; and the parties in equity court were <u>required</u> to testify, whereas in law court they could <u>not</u> testify.

(4) Code vs. Notice pleading

(a) Cases

i) *Bell v. Novick* ():

b) Pleading requirements

(1) Complaints

(a) The essential elements: the general rule is "when in doubt, include

it"; the more specific allegations you make, the more you'll learn from the Df.'s answer. But don't trap yourself by pleading nonexistent facts. And, in everything, strive for simplicity and avoid legalisms.

- **i) Jurisdictional and party allegations:** allege proper jurisdiction. Identify all the parties correctly; after the first use, abbreviate the parties' names.
- **ii) General allegations:** make your background allegations that set the scene and which are common to all your claims.
- **iii) Counts:** these are the individual claims; drawing from your general allegations, add the allegations that are specific to each claim.
- **iv) Damages:** allege damages and pray for relief.
- **v) Cases**
  - **a.** ***People v. Superior Court (Hernandez)*** (Cal. 1992): Pf.'s complaint has insufficient information--a problem of <u>form</u>.
  - **b.** *Haddle v. Garrison* (1996-1998):

(b) Consistency: under FRCP, you can plead inconsistent theories. This comes in handy (e.g., you want to sue multiple Dfs. but don't know which one is really at fault), but raises ethical and Rule 11 issues (e.g. FRCP 11(b)(3)--if you allege facts that don't have support now, but are likely to have support after discovery, you have to specifically identify that by pleading them "on information an belief").

(c) Disfavored claims

- **i) Fraud**
  - **a. Cases**
    - **1)** *Pratt & Whitney* ():
- **ii) Private Securities Litigation Reform Act:** in PSLRA pleadings, "on information and belief" allegations will not pass muster.
- **iii) Civil rights**
  - **a. Cases**
    - **1)** *Leatherman* ():
    - **2)** *Gomez* ():

(2) Responses

(a) General taxonomy of repsonses

- **i) Factual denials**
- **ii) Affirmative defenses**
- **iii) Legal sufficiency challenges:** FRCP 12(b)(6). A 12(b)(6) motion that goes beyond the pleadings will be treated as a motion for summary judgment.
- **iv) Technical defects**
  - **a. No jurisdiction**
    - **1) No PJ:** FRCP 12(b)(2).

2) **No SMJ:** FRCP 12(b)(1).

b. Improper venue: FRCP 12(b)(3).

c. Improper process: FRCP 12(b)(4).

d. Improper service: FRCP 12(b)(5).

e. Lack of necessary joinder: FRCP 12(b)(7).

v) Requests for a more definite statement: FRCP 12(3).

vi) Motions to strike: FRCP 12(f).

vii) Counterclaims

(b) Taxonomy of response forms

i) Pre-answer motions

ii) Answers

iii) Replies

(c) Cases

i) ***Layman v. SW Bell*** (): if you fail to assert an affirmative defense, you waive it (FRCP 8). FRCP 8 gives examples, not an exhaustive list, of affirmative defenses.

(3) Amendments: the FRCP takes a lenient position on amendments.

(a) When you can amend

i) Before a response is served: you can amend once--"as a matter of course"--at any time before a responsive pleading is served.

ii) If no response is permitted, within 20 days: if no response is permitted and the action hasn't been place on the trial calendar, you can amend at any time within 20 days after you served the pleading.

iii) By leave of the court: if you can't amend otherwise, you can if you get leave of court. Leave shall be freely given when justice so requires.

iv) By written consent of your opponent: if you can't amend otherwise, you can if you get written consent from the adverse party.

v) At trial: if the parties expressly or implicitly consent to trying certain issues, those issues will be treated as if they were raised in the pleadings. And either party can move to amend the pleadings to conform to what was tried--at any time, even after judgment.

vi) To get other evidence in: the court can allow amendments--and shall do so freely--when there is evidence that goes to the merits of the case and the adverse party can't show that admission of it would be prejudicial him.

(b) Responding to an amendment: you have to respond to an amended pleading either (a) within the time remaining for response to the original pleading, or (b) within 10 days after service of the amended pleading--whichever is longer. Or, the court can order otherwise.

(c) Relation back: an amendment "relates back" to the date of the original pleading in certain situations.

i) Option 1 (statutory RB): Does the relevant SoL permit relation back? If so, the amendment relates back.

ii) Option 2 (same transaction): Did the claim or defense in the amendment arise out of the "conduct, transaction, or occurrence" of the original pleading? If so, the amendment relates back.

a. Cases

1) *Moore v. Baker* (): the court finds no RB here because it view the "transaction" as the Pf.'s consent to surgery only--not the entire surgery event.

2) *Bonerb* (): the court allows RB because it views the "transaction" as Pf.'s participation in the rehab program--not just the basketball game where Pf. injured himself.

iii) Option 3 (wrong party name): If the amendment corrects or changes the name of a party, it might relate back.

a. Did the claim or defense in the amendment arise out of the "conduct, transaction, or occurrence" of the original pleading? If not, the name-changing amendment doesn't relate back.

b. Has the "new" party received notice of the action, within the time provided in 4(m), so that it won't be prejudiced in maintaining a defense on the merits? If not, the name-changing amendment doesn't relate back.

c. Did the "new" party know or should have known that, "but for a mistake" about the identity of the parties, the action would have been brought against it? If not, the name changing amendment doesn't relate back.

(d) Cases

i) ***Aquaslide*** ():

(4) Rule 11: Rule 11 uses an objective test--"pure heart, empty head" defenses won't work.

Comment: FRCP 11(b):

(a) Idaho: Idaho hasn't amended IRCP 11 to match the newer FRCP 11: (1) IRCP only regulates an attorney's signature; (2) IRCP contains no safe harbor provision (FRCP 11(c)(1)(A), which gives you 21 days after notice of a Rule 11 motion to correct your violation).

(b) Cases

i) *Bridges v. Diesel Service* (E.D. Pa. 1994): FRCP 11 requires reasonable research and truthful allegations in all pleadings. Itc., counsel wasn't fined because (1) he tried to remedy the situation right away and in good faith, (2) he sought to withdraw the complaint, and (3) the court thought he had already seen the error of his ways.

ii) *Business Guides* (1991): Pf.'s attorney violated FRCP 11(b), not by filing for a TRO (which required fast action, not allowing for thorough research), but by "later advocating" the position after it

should have been clear that it was untenable--Pf.'s attorney did not conduct a reasonable inquiry after filing.

iii) *Gerbode* (C.D. Cal. 1994): the court, using the discretion granted it by FRCP 11 (the court may impose a penalty, and the penalty shouldn't exceed the amount needed to deter), to adjust the amount of carrot without adjusting the stick--the moving party got half of its costs, and the court got the other half.

a. Idaho: IRCP 11 gives courts less discretion--the court shall impose a penalty under IRCP.

2. Joinder

a) Joinder roadmap

(1) One Pf. v. One Df.: as far as the FRCP is concerned, there's no limit to the kinds of claims Pf. may bring against Df. (because of FRCP 18 superjoinder of claims). But, there might be limits to the claims Pf. can bring that arise from common law--e.g., res judicata and jurisdiction.

(2) Any party v. any other party permissibly joined: once a party is permissibly joined under the FRCP, any party to the litigation who has claims against that party can add as many as they have (because of FRCP 18 superjoinder of claims).

(3) Parties who want to join together as Pfs. or Dfs.: to join together as Pfs. or Dfs., they must have at least one shared claim (then FRCP 18 superjoinder of claims kicks in, and any other claims can be added).

(4) Dfs. who want to join outsiders: Dfs. can't join whoever they want.

(a) In some situations, Df. can force Pf. to join additional parties (FRCP 19 compulsory party joinder).

(b) In some situations, Df. can join a third-party Df. for indemnification (FRCP 14 third-party practice).

(c) If Df. has counterclaims against Pf., Df. can join outsiders to the counterclaim (FRCP 13(h) counterclaim party joinder).

(5) Rarely is joinder mandatory: only one rule requires joinder of a claim (FRCP 13(a) compulsory counterclaims). Only one rule requires joinder of a party (FRCP 19 compulsory joinder of parties). But, there are often powerful incentives to join when it's not mandatory--e.g., claim and issue preclusion problems, or collateral estoppel--so, when in doubt, join.

b) Joinder of claims

(1) FRCP 18 superjoinder: once you get a party in the suit, you can pile up all the claims you've got against him.

Comment: FRCP 18(a): A party asserting a claim to relief as an original claim, counterclaim, cross-claim, or third-party claim, may join, either as independent or alternate claims, as many claims, legal, equitable, or maritime, as the party has against an opposing party.

(2) FRCP 13 counterclaim joinder

(a) 13(a) compulsory counterclaims: typically, Df. must counterclaim anything that arises out of the same "transaction or occurrence." Unless, either: (a) the counterclaim would require outsiders that the

court couldn't get jurisdiction over; (b) when the Pf. commenced this action, the counterclaim was the subject of another pending action; or (c) the court only has *in rem* PJ wrt. the Pf.'s claim.

Comment: FRCP 13(a): A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, IF:
* it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim AND
* does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction.

But the pleader need not state the claim IF:
(1) at the time the action was commenced the claim was the subject of another pending action, OR
(2) the opposing party brought suit upon the claim by attachment or other process by which the court did not acquire jurisdiction to render a personal judgment on that claim, and the pleader is not stating any counterclaim under this Rule 13.

(b) 13(b) permissive counterclaims: Df. can counterclaim anything he wants, even if it doesn't arise out of the same "transaction or occurrence" as the Pf.'s claim.

Comment: FRCP 13(b): A pleading may state as a counterclaim any claim against an opposing party not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim.

(3) Cases

(a) *Great Lakes Rubber* (): Pf.'s unfair competition claim is dismissed for lack of diversity, but Df. had already made a federal antitrust counterclaim--so Pf.'s unfair comp. claim was now a compulsory counterclaim to Df.'s antitrust counter (!).

c) Joinder of parties

(1) FRCP 19 compulsory joinder of parties: in certain circumstances, a party must be joined. If (a), (b), and (c) below are satisfied, then the court shall order joinder.

(a) Is the party subject to service? If not, no CJ.

(b) If the party is joined, will the court still have SMJ over the action? If not, no CJ.

(c) Satisfy at least one option from the following list, else no CJ.

i) Option 1: can complete relief be accorded to the existing parties without joinder? If so, this prong isn't satisfied, try the other.

ii) Option 2: does the party claim an interest relating to the subject of the action? If not, this prong isn't satisfied.

a. The party must be "so situated" that disposition without him would mean one of the following things, else no CJ.

1) Option 1: would disposition without him, as a practical matter, "impair or impede" his ability to protect the interest he claims? If not, this prong isn't satisfied.

2) Option 2: would disposition without him leave the existing parties subject to a substantial risk, because of the interest

he claims, of incurring either (a) multiple obligations or (b) inconsistent obligations? If not, this prong isn't satisfied.

(d) Refusal to join as plaintiff: if the party should join as a Pf., but refuses to, the court can join him either as (a) a Df., or (b) an involuntary Pf.

(e) Improper venue: if joining the party would make venue improper (and the party objects to venue), then the court shall dismiss him.

(f) Infeasible joinder: if a party must be joined but can't, the court has to decide whether (a) it can, in equity and good conscience, proceed without that party, or (b) if it has to dismiss the action. To make that decision, the court should consider a number of factors.

i) Some of the factors to consider: these are the ones listed in the Rule (following an "includes" clause).

a. Would judgment without the new guy be prejudicial to either (a) the existing parties or (b) the new guy?

b. Could the court put "protective provisions" in the judgment to lessen or avoid any prejudice?

c. Would judgment without the new guy be adequate?

d. Will Pf. have an adequate remedy if the action is dismissed for nonjoinder?

(2) FRCP 20 permissive joinder of parties: people can join together as Pfs., or be joined together as Dfs., only in certain situations.

(a) Joining together as plaintiffs: people can join together as Pfs. in certain situations.

i) They must all assert a right to relief in one of the following ways, else no permissive joinder.

a. Option 1: jointly.

b. Option 2: severally.

c. Option 3: in the alternative (i.e., one Df. of several is responsible).

ii) Does their right to relief arise out of the same transaction, occurrence, or series of transactions or occurrences? If not, no permissive joinder.

iii) Will a question of law or fact common to all of them arise in the action? If not, no permissive joinder.

(b) Joining together as defendants: people can join together as Dfs. The test is exactly the inverse of the permissive joinder as Pfs. test--the right must be asserted against, rather than by, these parties.

(3) FRCP 14 third party joinder: a Df. can bring in a third-party at any time, but only if the third-party is or might might be liable to him for all or part of the Pf.'s claim against the Df.

(a) Leave to join a third-party: Df. doesn't have to get leave to join a third-party if he files the 3P complaint within 10 days after answering.

Otherwise, he has to get leave by (1) giving notice about it to all the other parties, and (2) filing a motion for leave.

(b) The 3PD: the 3PD has to make defenses, counterclaims, cross-claims and all that, just like a regular Df. He can make any defenses against the Pf. that the Df. has against the Pf. He can assert any claim he's got against the Pf., as long as it arises out of the same transaction or occurrence as the Pf.'s claim against the Df.

(c) The plaintiff: the Pf. can assert any claim he's got against the 3PD, as long as it arises out of the same transaction or occurrence as his (original) claim against the Df.

(4) FRCP 13(h) counterclaim party joinder: parties can be joined to counterclaims just as if the counterclaims were claims--that is, in accordance with Rules 19 and 20.

(5) Cases

(a) ***Helzberg's*** ():

3. Intervention: existing parties may have a number of reasons not to want outside parties in the suit; e.g., the outside parties could prolong the proceedings, make the litigation more expensive, add to the discovery burden, or otherwise the lawsuit they've got going.

a) FRCP 24(a) intervention of right: a party has the right to intervene in two situations. But they have to timely apply.

(1) Option 1: a federal statute confers an unconditional right to intervene.

(2) Option 2: the party satisfies the following three conditions.

(a) Does the party have an interest that relates to the property or transaction that's the subject of the action? If not, no IoR.

(b) Is the party "so situated" that disposition without him would, as a practical matter, impair or impede his ability to protect that interest? If not, no IoR.

(c) Would the party's interest be adequately represented by the existing parties? If so, no IoR.

b) FRCP 24(b) permissive intervention: a court can permit a party to intervene in two situations. But it's difficult to get permissive intervention.

(1) Option 1: a federal statute confers a conditional right to intervene.

(2) Option 2: does the party's claim or defense have a question of fact or law in common with the main action? If so, intervention may be permitted.

(3) The court's discretion: the court gets to decide if a party seeking permissive intervention can come in. The court must consider whether allowing him in would either (a) unduly delay or (b) prejudice the adjudication of the existing parties' rights.

c) Interpleader: in certain situations, stakeholders in a dispute can force joinder of another party so that they aren't subject to multiple liability.

(1) FRCP 22 interpleader: a party can force joinder of a new guy that has a claim against the Pf. if the new guy's claim means that Pf. is or might be exposed to multiple liability. It doesn't matter if the claims (a) don't have a

common origin, or (b) aren't identical, as long as they're adverse to or independent of one another; it also doesn't matter if the Pf. says he isn't liable in whole or in part to any of the claimants.

(a) Diversity: Rule 22 requires complete diversity.

(b) Personal jurisdiction: Rule 22 requires the traditional PJ tests be met (including Rule 4 service of process).

(c) Amount in controversy: Rule 22 requires the standard § 1332 $75K (but it doesn't have to be deposited with the court).

(2) 28 USC § 1335 interpleader: federal district courts have original jurisdiction if over two or more adverse claimants who either are or might be claiming to be entitled to the same money or property, as long procedural requisites are satisfied. It doesn't matter if the claims (a) don't have a common origin, (b) aren't identical, as long as they're adverse and independent of one another.

(a) Diversity: § 1335 requires only minimal diversity between claimants.

(b) Personal jurisdiction: § 1335 relaxes the traditional PJ hurdle by permitting nationwide service (this is possible since federal District courts have national jurisdiction).

(c) Amount in controversy: § 1335 requires only $500 to be in play, <u>but</u> the amount has to be deposited with the court.

(3) Cases

(a) ***Cohen*** ():

B. Pretrial

1. Discovery

a) Motives: you don't want to let your opponent know the most damaging information about your case. Thus, in our system where you only get what you ask for, you'll have to give discovery requests their the narrowest readings possible, and you'll have to draft your own requests <u>very</u> carefully.

b) Scope

c) The work product rule

d) Expert witnesses

2. Default and dismissal

3. Settlement

4. Summary judgment

5. Pretrial conferences

C. Trial

1. Judges

a) The good judge

b) Recusal

(1) 28 USC § 455: general recusal provisions.

(a) (a): recusal if his impartiality might reasonably be questioned--it's the public's perception that's important here, not actual impartiality.

(b) (b)(1): mandatory recusal if the judge was a witness to the facts of the case he's hearing. Courts read mandatory recusal provisions very narrowly.

(c) (b)(5): mandatory where a spouse or relative is a party to the same proceeding. Courts read mandatory recusal provisions very narrowly.

(d) Cases

i) ***In re Hatcher*** (): a 455(a) case--judge's son presented witnesses at a substantially similar trial, and the judge watched him.

(2) 28 USC § 144: recusal on specific grounds--you must allege a specific basis for finding bias.

(a) Idaho: IRCP 40(g)(1): you only have to file a motion to disqualify a judge--no grounds are needed. But you only get one.

(b) Cases

i) *Berger* (): your original judge decides only if you affidavit satisfies 144; if there's a fact question, your judge can't rule on it.

2. Juries

a) Amendment VII

(1) The *Tull* test for new statutory actions: a two part test: (1) What's the closest 1791 analog to the new action?; (2) What remedy is sought?

(2) Cases

(a) ***Beacon Theatres*** (): except in extraordinary circumstances, you have to hear the legal issues (that are triable to the jury) first, in order to avoid infringing, through res judicata, the right to a jury trial.

(b) ***Dairy Queen*** (): the "constitutional right to trial by jury cannot be made to depend upon the choice of words used in the pleadings." Also itc.: although an accounting was an equitable remedy in 1791, back then the courts though jurors were too illiterate to do an accounting, but today, SCOTUS says, jurors can handle an accounting.

(c) *Markman* (): juries handled patent cases in 1791--but patent cases were much simpler then. Today, SCOTUS says, who should hear a patent case depends on the relative abilities of the judge and the jury to understand the case. This, along with *Dairy Queen*, moves the Amdt. VII analysis slightly away from the conventional, historical analysis.

b) Voir dire

(1) The jury pool: 28 USC § 1861--we want a fair cross-section of the community.

(2) Challenges for cause

(a) Idaho: Idaho statute sets out reasons for challenges for cause.

i) Related by blood or marriage to a party.

ii) Employment or financial relationship to a party.

iii) Interest in the outcome of the dispute.

iv) Unqualified belief as to the merits or key issues.

v) Bias or prejudice against or in favor of a party (this is the most

subjective cause).

(3) Peremptory challenges

(a) Cases

i) ***Batson*** (): SCOTUS says the prosecutor can not make peremptory challenges based on race. It's not Df.'s rights the court is worried about--it's the juror's rights to serve on a jury.

a. *Batson* may have lost it's teeth in *Parkett*, where a prosecutor was able to use peremptories to get black jurors off the panel by saying his reasons had to do with their hair.

ii) ***Edmonson*** (): the extension of *Batson* to civil juries. There's state action, SCOTUS says, because the private litigants are empaneling the state's jury. However, the opinion is a plurality--O'Connor only went along because one of the parties itc. was the U.S. (However, *J.E.B.* might extend *Edmonson* to all private litigants.)

3. JMoL

4. JNOV (renewed JMoL): this is the same as a regular directed verdict (JMoL), except that it comes after the jury has returned a verdict. In federal court, you must move for JMoL at trial in order to preserve your ability to make a JNOV motion (this is because of Amendment VII--there was no JNOV at common law in 1791, so we treat JNOV as a "delayed" JMoL in order to make it constitutional).

a) Idaho: in Idaho you don't have to preserve a JNOV by moving for it at trial (because Idaho doesn't have to same constitution as the U.S.).

5. New trial: FRCP 59.

a) Idaho: Idaho's new trial rule gives example of when new trial is appropriate.

(1) Legal error.

(2) Improper admission or exclusion of evidence.

(3) Juror misconduct.

(4) Newly discovered evidence that couldn't reasonably have been discovered for trial.

(5) Improper comments or instructions to the jury.

(6) Insufficiency of evidence (this is the most commonly used reason for new trial (but it's problematic because it puts jury trial at risk of usurpation by judges).

(7) Remittitur and additur.

b) FRE 606: what's admissible re: jury misconduct? Bribery, "outside influence," "extraneous prejudicial information."

(1) Idaho: in Idaho, "resort to chance" (coin flipping) and "quotient verdicts" are admissible as evidence of jury misconduct.

D. Appeal

1. Appealability

a) Adversity: you can appeal only if either (a) you lost or (b) you "won" but got relief different from what you requested--that is, the judgment must be "adverse" to you.

(1) Cases

(a) *Aetna* (5th Cir. 1955): Aetna can appeal, even though it got one of its relief alternatives, because the relief it got is dischargeable in bankruptcy, whereas the other type of relief it sought would not be. In other words, it can appeal because the relief it got was not of the same quality as the relief it preferred.

b) Waiver: generally, you can't appeal on a claim or theory you didn't present to the trial court.

c) Final judgment: ordinarily, you must have a final judgment before you can appeal a decision (the exception is in the limited number of circumstances where interlocutory review is available). This is because appellate jurisdiction is a subject matter jurisdiction issue--the SMJ of federal appeals court is limited by Article III, first, and then by Congress (most importantly, by 28 USC § 1491).

(1) The moment of final judgment: the exact moment of final judgment is the moment it is entered and published in the "civil docket." See FRCP 79. So, if you need to know the date of final judgment, you can check the civil docket every day until final judgment is entered.

(2) Appeals too soon: under FRAP 4(a)(2), a notice of appeal filed after the announcement of a decision but before the actual entry of the decision will be treated as filed on the date of (and after) the actual entry.

(3) Cases

(a) ***Liberty Mutual*** (1976): SCOTUS says, sua sponte, that it doesn't have jurisdiction over an appeal from a partial summary judgment--one the liability, but not the relief, half of a personal injury lawsuit. The federal appeals courts only have the jurisdiction expressly granted them by congress (in 28 USC § 1491).

i) Multiple claims: FRCP 54(b), which says judgments on some of the claims in a multiclaim suit are appealable, does not apply here--itc. involves a single claim seeking multiple forms of relief.

ii) Certification: 28 USC § 1292(b) certification would not have worked here because one of the requisites for certification is that it advance the termination of litigation--here, the suit would end quicker if the trial just would just issue an injunction, so that the parties can do a regular, § 1291 appeal.

d) Interlocutory review: in a limited number of circumstances, decisions can be appealed without a final judgment.

(1) 28 USC § 1291 appeal from final decision: the basic, default appeal.

(2) 28 USC § 1292(a) injunctive relief exception: carves out an exception to § 1291--injunctive orders may be appealed before final judgment (since injunctions can last a long time, or forever, before they are performed).

(3) 28 USC § 1292(b) certification: to succeed with a certification, you must satisfy three requisites: (1) the question must (a) be one of law and (b) control the case; (2) there must be a substantive ground for difference on

the question; and (3) certification and interlocutory review must advance the termination of litigation. In the federal system, if you ask your trial judge to certify and he refuses, you're out of luck on certification.

(a) Idaho certification: in Idaho, if the trial judge refuses to certify a question, you can ask the court of appeals, directly, to certify it.

(4) Collateral order doctrine: if a decision--but not a final judgment--has been made that (1) finally determines a claim that is both (2) collateral to the merits (and important to the rights of a party), and (3) effectively unreviewable, then that decision may be appealed before final judgment. The COD is a, and the only, kind of "practical finality."

(a) Cases

i) ***Lauro Lines*** (1989): Df. wanted interlocutory review of the district court's determination that its forum selection clause wouldn't be enforced. While the decision on the clause was finally determined and collateral, it was not effectively unreviewable since Df. would eventually have to stand trial somewhere, and could appeal after that trial without its rights being compromised (as they would be if Df. was seeking review of an immunity claim).

(5) FRCP 54(b) final decision in multiparty/multiclaim suits: in a lawsuit with either multiple claims or parties, the trial judge may enter final judgment on some of the claims or parties--i.e., he doesn't have to enter judgment on all of them at the same time. FRCP 54(b) says that when the trial judge does rule on some of the claims or parties, those judgments are appealable under § 1291.

(6) Mandamus: mandamus is made by writ--an "extraordinary writ." Mandamus is only available when a court has either (a) not done something it must do or (b) done something it has absolutely no power to do.

2. Scope of review

a) Harmless errors: federal courts can't reverse decisions based on harmless errors alone. That is, per 28 USC § 2111, they cannot pay regard to "errors or defects which do not affect the substantial rights of the parties."

b) Cases

(1) *Bessemer City* (1985): SCOTUS outlines the "clearly erroneous" standard of review: if there are multiple permissible views of the facts, it is not clearly erroneous if the trial court chose one of them. This seems to be (1) just like the standard of review for jury verdicts, and (2) inconsistent with the court's opinion in *U.S. Gypsum*, where it said that "clearly erroneous" review is appropriate whenever the court has "a firm conviction of mistake"--even if there's evidence to support the trial judge's view.

(a) Broad coverage of CE review: overruling prior cases, such as *Orvis*, SCOTUS also says itc. that in applying the CE standard of review, it doesn't matter whether documents or witnesses provide the relevant evidence.

E. Alternatives to litigation

1. **Mediation**
   a) **Idaho:** IRCP 16(j) allows courts in custody matters to order mediation--and it's routine that they do. IRCP 16(k) allows courts in any civil matter to order mediation if it wants.
2. **Coerced settlement**
   a) **Cases**
      (1) *Lockhart* (): the judge forced one of the parties to negotiate with the other, and to bring someone to the negotiations with authority to settle. He may have had the authority to do this, too--FRCP 16(c)(9) grants the court the power to take "appropriate action" wrt. settlement and the use of special procedures to assist in resolving the dispute. Lewis says this means a judge can force party to negotiate in good faith.
3. **Arbritration**
   a) **Cases**
      (1) *Ferguson v. Writers Guild* (): although Pf. wants the court to review to procedural improprieties of the arbitration process, the court will only review the contract where Pf. agreed to arbitration.
      (2) *Engalla* (): though the court rejects the Pf.'s unconscionability attack on his arbitration agreement (because there was no evidence of overly mismatched bargaining power), it accepts Pf.'s fraud attack on the arbitration itself, because Df. administration of the arbitration is so different than what it described in the contract that the court says Df.'s contract claims were misrepresentations rising to the level of fraud.
         (a) Dissent: the dissent sees this decision--relieving Pf. of his agreement to arbitrate--as one that will, in future, allow parties to withdraw from arbitration whenever they don't like how it's going.

F. Remedies

1. **Subjective damages**
   a) **Cases**
      (1) ***Hatahley*** ():
2. **Punitive damages**
   a) **Cases**
      (1) *Honda Motor Co. v. Oberg* (1994): Oregon constitutional provision, allowing review of a punitive damages award only when there is absolutely no evidence to support it, violated Due Process, says SCOTUS, because it could allow awards that are either biased, too arbitrary, or both.
      (2) *BMW v. Gore* (1996): SCOTUS sets out three guideposts for assessing a punitive damages award: (1) how reprehensible was the Df.'s conduct?; (2) What is the punitive to compensatory ratio?; (3) what has been done previously in comparable cases?
         (a) *Walston v. Monumental Life* (Idaho 1996): an Idaho case following *Gore*.
      (3) *State Farm v. Campbell* (2003): SCOTUS says that, ordinarily, single digit

punitive to compensatory ratios will test the limits of Due Process.

3. Equitable remedies

a) Taxonomy of remedies

(1) Equitable remedies

(a) Injunctions: the court orders Df. to do or refrain from doing something; if Df. doesn't, it will be held in contempt, and so fined or jailed. This is the most common form of equitable relief.

(b) Constructive trust: the court declares that Df. has been holding funds (that it wrongfully diverted) in trust for the Pf.

(c) Accounting: where it is impossible for Pf. to calculate his money damages, the court orders an accounting of Df. to determine exactly what's owed.

(d) Contracts relief

i) Rescission: the court declares that the parties never entered into their contract.

ii) Cancellation: the court declares that the parties have canceled their contract.

iii) Reformation: the court changes the parties' contract.

(e) Real property relief

i) Quiet title: the court declares that Pf. has or does not have good title to his property.

ii) Remove clouds from the title: the court declares that certain clouds on Pf.'s title no longer exist.

(2) Legal remedies

(a) Money damages: substitutionary relief--the most common form of legal remedy.

(b) Replevin: the sheriff will take something from Df. and return it to the Pf.

(c) Ejectment: the sheriff will physically remove Dfs. from Pf.'s land.

(d) Mandamus: the court orders a lower court, or a public official, to do or refrain from doing something.

(e) Habeas corpus: the court reviews Pf.'s punishment or detention for legality.

b) Availability of equitable remedies: courts prefer legal to equitable remedies.

c) Cases

(1) *Sigma Chemical v. Harris* (E.D. Mo. 1985): to get injunctive relief, Pf. had to prove (1) he had no adequate legal remedy, and (2) denial of an injunction would harm Pf. more than granting an injunction would harm Df.

4. Declaratory judgments: in a declaratory judgment, the court declares what the parties' legal rights and obligations are. Common uses for declaratory judgments are in contracts disputes, and by insurance companies who want to determine the extent of a policy's coverage (so that they know whether they have to defend the

policyholder). Declaratory judgments must regard a real and existing dispute--courts will not adjudicate a hypothetical dispute that might arise. Declaratory judgments are legal remedies.

5. **Provisional remedies:** temporary and preliminary remedies--such as temporary restraining orders (TROs) and preliminary injunctions--that solve time-sensitive problems until a full adjudication can be held. The problem is that we have to change the status quo before knowing all the information we'd like to--this leads to Due Process issues.
   a) **Cases**
      (1) *Inglis & Sons* (): although, ordinarily a preliminary injunction is not available to a Pf. whose case is not terribly strong, the court itc. says that if the probability of harm without a preliminary injunction is high, the Pf.'s case doesn't have to be as strong as it ordinarily would.
      (2) ***Fuentes*** (): SCOTUS sets out the three requirements for a constitutional writ of replevin: the claimant must (1) post a bond for the value of the property, (2) allege entitlement to the property, and (3) expose itself to liability if it turns out to be wrong.
         (a) But see *Mitchell v. W.T. Grant* (): SCOTUS said that a Louisiana statute that allows repossession without a preseizure hearing is a constitutional statute. This is the probably the current state of the law, except that in *Di-Chem* (), SCOTUS said a Georgia statute like the one in *Fuentes* was not constitutional, despite *Mitchell*.
6. **Attorney's fees:** under the American rule, parties bear their own attorney's fees (whereas under the English rule, the winner gets his attorney's fees).
   a) **Taxonomy of approaches to funding litigation**
      (1) **Hourly fees:** a straight fee per hour of work on the client's case.
      (2) **Contingent fees:** you get a certain percentage of the recovery (and so $0 if you don't recover). Contingent fees come with ethical baggage. For one thing, you must represent your client first and only--the impact of fee considerations must be zero; some lawyers will adjust the contingency fee percentage if the case settles early, others will use a hybrid fee. Another consideration is in selecting cases--a "stock-picking" method raises ethical issues.
      (3) **Common fund:**
      (4) **Prepaid legal services:** people can pay a set rate for a set amount of legal services that can be used when needed.
      (5) **Legal aid:** privately and publicly funded organizations that provide free and low-cost legal services to low-income and underrepresented segments of communities.
      (6) **Pro bono obligations:** state bar regulations and private firm policies require a certain number of pro bono hours each year.
      (7) **Private attorney general:** in certain jurisdictions, the state will pay for a private firm to litigate a case that benefits the public as an attorney general would. PAG is available in Idaho.

(a) PAG requisites

i) The lawsuit must provide a substantial public benefit (quality).

ii) The lawsuit must benefit a large number of people (quantity).

iii) Private action must be necessary--usually this means the attorney general has refused to prosecute the claim.

iv) The lawsuit must be brought for public purposes.

b) FRCP 68: Offer of Judgment: a stick rule. If Pf. refuses a reasonable settlement offer, he loses attorney's fee for the time after the offer epoch; and, if Df. wins, Pf. must pay Df.'s costs (less attorney's fees) for the time after the offer epoch.

(1) The Idaho version: just like FRCP 68, except if Df. wins, Df. can get post-offer attorney's fees. Also in Idaho, IC 12-301, Pf. can make an FRCP 68-type settlement offer to Df.; and if Pf. makes an offer and recovers more at the end of a trial, Pf. can recover also the interest on the judgment from the time the offer was made.

G. Class actions: FRCP 23.

1. Prerequisites

a) Numerosity: it must be nonfeasible to have all members of the class in the courtroom at once ("so numerous that joinder of all members is impracticable").

b) Commonality: the class members must all share a common question of law or fact.

c) Typicality: the class representative's claim must be typical of the class members' claims. In *Falcon*, SCOTUS said that courts have an obligation to not take a party's word on typicality--they must investigate to make sure the representation is actually typical.

d) Adequacy: the class representative must have the motivation, funding, and skill necessary to represent the entire class. *Newbury* says that a victim who wants to stay a victim doesn't have any standing to complain about class action adequacy.

e) Cases

(1) *Hansberry* (): due process will not allow parties to be barred by res judicata if they weren't adequately represented at the prior proceeding. Thus, FRCP 23(a) takes on a constitutional flavor--every class action is potentially subject to collateral attack on Due Process grounds.

2. Taxonomy

a) (b)(1) separate actions would create a risk of either (a) inconsistent/varying adjudications, or (b) being dispositive of the interests of other class members, as a practical matter, or (c) substantially impairing or impeding other class members' ability to protect their interests, as a practical matter.

b) (b)(2) the opposing party has acted or refused to act in a such a way that injunctive or declaratory relief is appropriate.

c) (b)(3) (1) the common questions of law or fact predominate over questions affecting only individual members and (2) a class action is superior to other

methods of adjudication.

(1) Factors for determining if a (b)(3) class action is appropriate

(a) The interest of the class in individually controlling separate actions.

(b) The extent and nature of litigation by/against class members that's already started.

(c) The desirability of concentrating the litigation in this particular forum.

(d) The likely difficulties of managing this class action.

(2) The (b)(3) notice requirement: (b)(3) class representatives must provide the best notice practicable to the individual members of the class. The notice must contain (1) an opt-out provision, (2) notice that the judgment will affect you if you don't opt out, and (3) any member who doesn't opt out can enter an appearance through counsel.

(3) Cases

(a) *Shutts* (): SCOTUS spells out what the constitution requires for (b)(3) notice--giving FRCP 23(c) a constitutional flavor.

i) First class mail: first-class mail for (b)(3) notice is now constitutionally required.

ii) Opt out: a chance to opt out from a (b)(3) class action is now constitutionally required (but an opt-in rule is not).

iii) Opportunity to participate: each class member must have an opportunity to participate, through counsel, in the class action--this is constitutionally required, SCOTUS says. (This isn't as big a problem as it might seem--most members won't exercise this right, and courts can still refuse to hear redundant arguments.)

3. Procedures

4. Settlement